**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **DANA ALLEN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 237,846 |
| **WAL-MART** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **INSURANCE COMPANY STATE OF PENNSYLVANIA** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals the July 23, 2001 award of Administrative Law Judge Pamela J. Fuller. Claimant was awarded a 40 percent permanent partial disability to the body as a whole based upon a functional impairment as a result of injuries suffered on June 23, 1998, while employed with Wal-Mart. Claimant contends the Administrative Law Judge erred in limiting her award to a functional impairment, arguing that she is entitled to a permanent total disability as a result of the injuries and follow-up surgery.

Respondent contends claimant should be limited to her functional impairment, as claimant was offered a job within her restrictions and claimant refused to attempt that job. The Board held oral argument on January 11, 2002.

### APPEARANCES

Claimant appeared by her attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, R. Todd King of Wichita, Kansas.

### RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the award of the Administrative Law Judge. The parties stipulated at oral argument before the Board that claimant's brief, which was filed out of time, could be considered by the Board as a part of claimant's argument.

## ISSUES

What is the nature and extent of claimant's injury and disability? More particularly, should claimant be limited to her functional impairment for refusing to attempt an offered job in violation of the policies set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997)? Or, in the alternative, has claimant proven that she is permanently and totally incapable of engaging in any type of substantial and gainful employment?

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the award of the Administrative Law Judge should be modified to grant claimant an award for a permanent total disability.

Claimant worked for respondent as a garden center stocker when, on June 23, 1998, after unloading three semi-trucks full of merchandise, she began experiencing pain all over her body, especially in her left shoulder and back. Claimant reported the injury to her employer and was authorized to see numerous physicians, including J. B. Goosens, M.D., Dr. Paltoo and Dr. Khardidi, and finally Lawrence A. Vierra, D.O., a board certified orthopedic surgeon.

Claimant underwent an MRI and was diagnosed with disc dessication at L5-S1 with a mild to moderate disc protrusion at L5-S1 and degenerative disc disease. A follow-up MRI also suggested foraminal stenosis, combined from a bulging anulus and an encroachment at the S1 superior facet with mild facet arthritis.

On September 17, 1998, claimant underwent a laminotomy bilaterally at L5-S1 with bilateral foraminotomies at S1, partial facetectomies at L5-S1 and a discectomy. Initially, the surgery appeared to be successful with claimant recovering well. However, claimant soon began experiencing postoperative problems. She was returned to work by Dr. Vierra on May 9, 2000, with restrictions that her work day be limited to 4 hours per day. She was also restricted to no lifting over 5 pounds, no handling, moving, pushing or pulling over 5 pounds, no overhead work, no bending, lifting, reaching, crawling, stooping, climbing or kneeling, and was limited to standing 15 minutes maximum and walking 5 minutes maximum. She was also instructed to sit or change position as needed.

On June 1, 2000, respondent provided claimant with a letter, advising that she was to return to work in their fitting room, answering the telephone. Respondent, in the letter, noted that claimant's hours would be "from 3 P.M. to close" and also advised that there was a stool in the fitting room for claimant to use. Claimant, rather than attempting the

position, provided respondent's store co-manager, Michael Wyrick, with a letter advising that there were certain problems associated with the job offered. Claimant identified the job as a "make-work" job which, in claimant's opinion, had never existed before and did not appear to be permanent. Claimant also objected, as there was no indication of how many hours she would be working and no indication of the pay rate. Finally, claimant objected to the daytime shift, as she had earlier advised respondent she was only able to work at night.

Claimant rejected the offer, arguing that respondent intentionally offered her a job which she could not and would not take. She went on to state that if respondent was not willing to accommodate her in a normal position, there was no need for respondent to demean her or offer her work which was, in her opinion, clearly impossible.

Neither the store manager nor anyone else on behalf of respondent responded to claimant's letter. But during trial, respondent's representative, John T. Hall, the store manager, testified that they were willing to accommodate claimant's restrictions as noted in the June 1, 2000 letter. The letter written by store co-manager Mr. Wyrick, in Mr. Hall's opinion, was an appropriate offer of employment. However, when cross-examined, Mr. Hall was unable to state what restrictions claimant was under at the time the letter was issued. He did recall claimant was under light-duty restrictions, but was not able to state with any specificity the nature of Dr. Vierra's restrictions. He did testify that Dr. Vierra's restrictions had been provided to him and those were the restrictions he was attempting to accommodate with the fitting room job offer. Mr. Hall went on to testify that the fitting room job met the subsequent restrictions of Dr. Brown, Dr. Mills and Dr. Vierra, and the job could be tailor made to accommodate any restrictions.

Mr. Hall also stated that claimant would have to attempt the job before they would know if any additional restrictions or modifications of restrictions would be necessary. He acknowledged, however, that this willingness to further accommodate was never communicated to claimant.

On April 27, 2000, claimant was examined by Philip R. Mills, M.D., a specialist in physical medicine and rehabilitation, at the request of respondent. He found claimant suffered from cauda equina syndrome and was status post-lumbosacral surgery. Cauda equina syndrome was described as pressure in the distal lumbar segments of a series of nerves. When the pressure becomes great, an individual will undergo certain symptoms, including loss of bowel and bladder control, loss of sexual function and anesthesia in the perineal area, all indicating a rather devastating loss of physical function.

Dr. Mills assessed claimant a 20 percent permanent partial impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He recommended claimant be limited to sedentary type work and that she be allowed to change positions on an as-needed basis while sitting. When described the

Wal-Mart job, he testified that if it allowed her to sit and stand at her discretion while answering the telephone, that would be within her restrictions.

Claimant was examined by Pedro Murati, M.D., at the request of claimant's attorney. Dr. Murati also found claimant to have suffered a substantial disability as a result of the back injury and subsequent surgeries, and opined that she had suffered a 33 percent permanent partial impairment to the body as a whole based upon the AMA Guides, Fourth Edition. Dr. Murati testified that, in his opinion, claimant was realistically and essentially unemployable.

Due to the conflict between Dr. Mills and Dr. Murati, claimant was referred to C. Reiff Brown, M.D., by the Administrative Law Judge for an independent medical examination. Claimant was also diagnosed with cauda equina syndrome by Dr. Brown, who opined that claimant had a 40 percent impairment to the body as a whole based upon the AMA Guides, Fourth Edition. He restricted claimant to 20 pounds occasional lift, 10 pounds frequent lift, with no bending, lifting, forward frequent flexion or rotation allowed. He recommended claimant alternate sitting, standing and walking, and should avoid long walks altogether. He also testified that if claimant were offered a job that allowed her to sit and stand and walk at her discretion and stay within the lifting restrictions, it would be something she could perform. Dr. Brown agreed with the restrictions imposed by the treating physician, Dr. Vierra, that limited claimant to part-time employment.

After claimant provided to respondent the letter rejecting respondent's offer of employment, the communication between claimant and respondent ended. Respondent provided no additional offers of accommodation, and claimant, even though she was shopping in the store on several occasions, made no attempt to inquire as to what, if any, work was available within her medical restrictions.

Claimant was referred to vocational expert Jerry D. Hardin for a review of the work tasks claimant performed over the 15 years preceding her accident. Dr. Mills was provided a copy of Mr. Hardin's report and agreed with Mr. Hardin's analysis that based upon Dr. Mills' restrictions, claimant had a 42 percent task loss. No other task loss opinion was placed in the record, although Dr. Murati did testify that, in his opinion, claimant was realistically unemployable.

Mr. Hardin also testified that claimant was capable of earning $220 per week in the open labor market which, when compared to her average weekly wage of $256 found in the award, would result in a 15 percent wage loss. However, the $220 average weekly wage used by Mr. Hardin is inconsistent with the $256 found by the Administrative Law Judge in the award. The Appeals Board will utilize Mr. Hardin's $220 average weekly wage for purposes of claimant's wage earning ability should it be found that claimant failed to put forth a good faith effort to find appropriate employment.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to the benefits requested by a preponderance of the credible evidence. *See* K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

Respondent acknowledges claimant suffered accidental injury arising out of and in the course of her employment with the only dispute being the nature and extent of that injury.

K.S.A. 1997 Supp. 44-510e(a) defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Here, claimant was examined by three doctors, all of whom expressed opinions regarding claimant's permanent functional impairment based upon the AMA Guides, Fourth Edition. The Administrative Law Judge found Dr. Brown's opinion that claimant suffered a 40 percent impairment to the body as a whole to be the most accurate, and the Board agrees. Dr. Brown was appointed to provide an independent medical examination with the expectation that his opinion be unbiased and objective. The Appeals Board finds Dr. Brown's opinion did take into consideration all of claimant's symptoms and restrictions. The Appeals Board, therefore, finds claimant has suffered a 40 percent impairment to the body as a whole on a functional basis.

K.S.A. 1997 Supp. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The restrictions placed upon claimant are very limiting. All doctors who testified agreed claimant would be severely restricted in her ability to obtain employment, with Dr. Murati testifying that claimant was realistically and essentially unemployable. Both Dr. Mills and Dr. Brown noted that claimant's limitations would obligate that she sit and stand on a regular basis with severe limitations placed upon her ability to lift, bend or walk any distance.

Both the treating physician, Dr. Vierra, and the court-appointed neutral physician, Dr. Brown, believed claimant could not work a full 8-hour day. Dr. Vierra limited claimant to working 4 hours a day. Dr. Brown opined that claimant would require either part-time work or a job that would allow her to lie down several times a day. Dr. Brown acknowledged that it would be difficult to find an employer who would put up with those necessary rest periods. Claimant's expert, Dr. Murati, opined that claimant was realistically unemployable in the open labor market. Only the medical expert hired by respondent, Dr. Mills, believed clamant was capable of full-time employment. But even Dr. Mills limited claimant to sedentary work that would also allow her to change her positions, and acknowledged her cauda equina syndrome could periodically cause certain severe and debilitating symptoms.

Dr. Brown in his November 22, 2000, report noted:

> She continues to have severe lumbosacral discomfort, some of which is present at all times, but anytime she increases her level of physical activity or, for that matter, remains in one position for longer periods of time, her low back pain becomes quite severe.[1]

The Board finds the greater weight of the expert medical and vocational testimony, together with claimant's testimony, supports an award for a permanent total disability. Even if claimant could find employment that would accommodate her restrictions, which is doubtful, working part time at or near minimum wage is not substantial gainful employment.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge's award should be modified as follows: an award of compensation is entered in accordance with the above findings in favor of the claimant, Dana Allen, and against the respondent, Wal-Mart, and its insurance carrier, Insurance Company State of Pennsylvania, for an accidental injury occurring on June 23, 1998, for a permanent total disability based upon an average weekly wage of $256 per week.

Claimant is entitled to 99.89 weeks temporary total disability compensation at the rate of $170.68 per week totaling $17,049.23, followed by 632.47 weeks permanent total disability compensation at the rate of $170.68 per week totaling $107,950.77, for a total award not to exceed $125,000.

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[1] Exhibit 1 to June 11, 2001 Depo. of Dr. Brown.

As of August 23, 2002, claimant would be entitled to 99.89 weeks temporary total disability compensation at the rate of $170.68 per week totaling $17,049.23, followed thereafter by 117.54 weeks permanent total disability compensation at the rate of $170.68 per week in the amount of $20,061.73, for a total due and owing of $37,110.96 to be paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 514.93 weeks permanent partial total compensation at the rate of $170.68 per week totaling $87,889.04 until fully paid or until further order of the Director.

In all other regards the award of the Administrative Law Judge is adopted insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

**DISSENT**

The undersigned respectfully dissents from the award of the majority.

In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Kansas Court of Appeals held that a worker should not be allowed to refuse a proffered job that the worker has the ability to perform and then collect workers' compensation benefits.

The letter from respondent to claimant offered her a job. It is understood that the letter was not clear as to whether it met the restrictions of Dr. Vierra. However, Mr. Hall did testify that his intention was that the letter would meet the restrictions set forth by Dr. Vierra. The restrictions of Dr. Vierra, in place at the time, limited claimant to a 4-hour day. Claimant's refusal to even attempt that job did not constitute a good faith effort on her

part, thus placing her in violation of the policies set forth in Foulk. Claimant was being paid $6.40 per hour which, when calculated on 4 hours per day and a 20-hour week, would pay claimant $128 per week. This, when compared to her average weekly wage of $256, constitutes a 50 percent wage loss.

The undersigned would impute to claimant a wage based upon a 4-hour day, five days per week, resulting in a 50 percent wage loss. Claimant would, therefore, be entitled to a 50 percent wage loss which, when averaged with her 42 percent task loss, would entitle claimant to a 46 percent permanent partial work disability.

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
R. Todd King, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation